

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of MAGDALENA
APOSTOL and EMIL MILYAKOV

MAGDALENA APOSTOL,

Petitioner and Appellant,

v.

EMIL MILYAKOV,

Respondent.

A152915 & A154696

(San Francisco City and County
Super. Ct. No. FDI-13-780186)

Appellant Magdalena Apostol appeals in propria persona in this consolidated matter arising from the trial court's child custody and child support orders, following hearings on October 3, 2017 (case No. A152915), and April 3, 2017 (case No. A154696). Appellant contends the court abused its discretion when it refused to modify prior custody and visitation orders and when it imputed income to her for purposes of setting the amount of child support she must pay. She also appears to be challenging the court's denial of her motion for reconsideration. We shall reverse the court's order that appellant pay \$1,036 in child support arrears, but shall otherwise affirm the court's orders.

BACKGROUND¹

Appellant and respondent Emil Milyakov divorced around 2014.

In October 2016, a juvenile dependency court case against appellant was dismissed and respondent was granted legal and physical custody of the parties' then 10-year-old child, N.M. In an order after hearing filed on May 2, 2017, the trial court ordered an "interview of collateral sources regarding whether [N.M.] is ready for visits" with appellant. The order provided that before custody and visitation could be modified to allow visitation between appellant and N.M., the criminal protective order filed against appellant on September 16, 2016, would have to be modified to permit contact. In a June 29, 2017 order after hearing, the court ordered the parties "to complete intake with Rally [Family Visitation Services] and return to court before any visits take place." The court further ordered that appellant "may have up to two supervised therapeutic visits with [N.M.] per month at Rally" and noted that the criminal protective order had been dismissed.

On August 3, 2017, respondent filed a request for a change in child support for N.M., asking the court to increase the income it had previously imputed to appellant from \$2,500 to \$4,166 per month and to order that she pay child support and half of respondent's childcare costs. Respondent had previously paid child support to appellant, but stated that appellant should now pay him the requested child support because he "had full custody of [N.M.] since 8/29/2016 as a result of [appellant's] arrest and subsequent

¹ On March 7, 2019, we granted in part respondent's motion to augment the record on appeal with additional trial court records in this matter.

Respondent asserts that we should ignore the appellant's appendix, which appellant filed in case No. A154696, because she designated a clerk's transcript after filing her appeal. (See Cal. Rules of Court, rule 8.121.) Appellant, however, designated a clerk's transcript only in case No. A152915. We therefore decline respondent's request to wholly disregard the documents in the appellant's appendix for purposes of deciding this now consolidated appeal. We will, however, ignore any factual statements made by appellant in her briefing that are outside of the record on appeal, as well as any documents in the appellant's appendix that were not before the trial court.

investigation by Child Protective Services into [appellant's] abuse of [N.M.]. Due to respondent's work schedule, child care is necessary."

On September 14, 2017, appellant filed a request for a change in child custody and child support, seeking joint legal and physical custody of N.M. and child support from respondent.

At the October 3, 2017 combined hearing on respondent's request for a change in child support and appellant's request for a change in child custody and child support, the court first addressed child custody and visitation. The court referred to the prior dependency case in which N.M. was removed from appellant's custody and allegations of physical abuse were sustained. The court explained that, "based on the previous finding of abuse, there's pretty much a presumption against [appellant] having legal and physical custody until you rebut that presumption." The court then told appellant that the type of activities in which she would need to participate to rebut the presumption would include a parenting class and participation in "family therapy to address what happened last year." Appellant informed the court that she had already completed a parenting class and the court indicated she needed to submit a certificate of completion. The court also noted that appellant had begun supervised visits with N.M., which "appeared to go well. [¶] But I think it important that you are able to acknowledge what happened last year with [N.M.] so that you can move forward, and, most importantly to the court, so that the problems that you had last year don't happen again. [¶] I think one way to do that is through family therapy" with N.M.

The court then ordered continued supervised visitation, but eliminated the therapeutic requirement. The court also ordered the parties to ascertain whether N.M.'s individual therapist believed it would be appropriate to provide family therapy and, if not, appellant "should make arrangements to find a family therapist through her own insurance provider."

The court then addressed the issue of child support and respondent's request to increase the imputation of income, noting that in an October 2014 court order, the trial court had imputed an income of \$2,500 per month to appellant, which the court described

at the October 3, 2017 hearing as “basically a San Francisco minimum wage imputation.” The court stated that it was not going to increase the income imputed to appellant, but would continue to impute an income of \$2,500 per month to her, plus the \$500 per month she received in spousal support from respondent. Based on the DissoMaster calculation, the court ordered appellant to pay respondent child support in the total amount of \$653, which included basic child support of \$331 and \$322 in “add-ons,” i.e., one-half of respondent’s child care expenses. The court also found that appellant did not suffer from a disability, despite having suffered a broken clavicle in a car accident seven months earlier, in March 2017, and being off work for a period of time. The court therefore added \$1,306 in child support arrears, from the date respondent filed his motion on August 3, 2017, for which appellant was to pay \$100 per month until the arrears were paid off. The court then stated that it would review child support again in six months at which time it might increase the amount of income imputed to appellant.

On October 23, 2017, appellant filed a notice of appeal from the court’s orders at the October 3, hearing. (Case No. A152915.)

On December 12, 2017, the court entered written findings and orders based on the findings and orders it made orally at the October hearing, in which it further explained its decision to impute \$2,500 per month in income to appellant. Specifically, the court found that appellant’s declaration had not shown that she suffered from a disability that prevented her from working despite having broken her clavicle in the March 8 accident, that an income and expense declaration filed in June indicated that she had been working as a real estate salesperson since May, and that she had not shown that she was unable to secure employment. Regarding custody and visitation, the court reiterated that it had dropped the therapeutic requirement from appellant’s supervised visitation and ordered that appellant submit proof of completion of a parenting class and participate in family therapy with N.M.

At the three-month review hearing on custody and visitation, which took place on January 9, 2018, the court stated that it was aware that one of the underlying issues in the case was “alcohol abuse and anger management issues on [appellant’s] part. [¶] So now

it's been more than a year since the dependency case was dismissed, and what I had expected . . . before today, was the family therapy piece.” The court expressed disappointment that appellant had not started family therapy with N.M. in the three months since it had made that order and said she needed to begin family therapy to move forward on her request for shared custody.

The court again found “there’s a presumption against [appellant] having custody of the child because of the sustained allegations of abuse. So under the California law, there’s a presumption that you not have joint custody or sole custody of the child until you have rebutted the presumption against your custody. [¶] So the underlying issues, as I understand it from the record, are alcohol or substance abuse treatment, anger management classes, or therapy for those issues.” The court also ordered an evaluation of N.M. to determine whether the child would like to have unsupervised contact with appellant.

On January 9, 2018, the same date as the review hearing, appellant filed another request to modify custody and child support, as well as a motion for reconsideration of the December 12, 2017 order. On January 17, appellant filed an amended declaration in support of her motion for reconsideration.

At a February 13, 2018 review hearing, the court noted that it had received the report it had ordered at the previous hearing, which “indicates [N.M.] is not yet comfortable to have unsupervised visits.” Appellant told the court that in the several weeks since the interview with N.M., she and N.M. had had two visits with a family therapist. According to appellant, the therapist was “very pleased to see such a warm and sincere relationship with a strong bonding between mother and [child],” and that the therapist “sees no problem at all.” Appellant also told the court that she was taking an anger management course and had obtained a document related to substance abuse.

The court stated that it was very encouraged by the progress appellant was making on services, but was not going to vacate the order for supervised visits pending the hearing already scheduled for April 3, 2018. In the interim, the court ordered an interview of the family therapist for an update on the progress of the family therapy and

whether there was a recommendation regarding appellant's request for unsupervised visits. The court also asked appellant to submit the documents regarding anger management and substance abuse.²

At the April 3, 2018 review hearing, appellant expressed strong disagreement with the court's tentative ruling, in which it denied her request for joint legal and physical custody of N.M., but modified her visitation to one four-hour unsupervised visit per week. The court then told appellant, as it had in the past, that she "need[ed] to acknowledge and accept responsibility that the reason for the change of custody of your [child] to father's custody was due to your own actions of child abuse that led to Child Protective Services removing the child from your [care]. And as we have talked about, there is certain aspects [*sic*] of your conduct and behavior and health that you need to address before the court will restore custody to you.

"I am glad that you started the family therapy, which I ordered you to do several months ago. I am glad that you have done the parenting class, and I hope that it benefited you. And I am disappointed that to this day you continue to minimize your role in why [N.M.] is living with . . . father.

"So I'm glad that you have taken the steps that you have. You're on the right track. Which is why I'm going to lift the supervised visitation request" The court then adopted in full its tentative ruling, in which it, *inter alia*, denied appellant's request to modify child support, denied her request for joint legal and physical custody of N.M., granted her request to modify visitation in part, and denied her motion for reconsideration.³

² On March 20, 2018, appellant filed an *ex parte* request to modify custody to unsupervised visitation, which the court denied pending the upcoming hearing on April 3.

³ When appellant said she did not "understand what exactly I should do now," the court said that at some point she should provide it "with some evidence related to your treatment or assessment for substance and alcohol abuse." The court said she should also continue with family therapy.

On, April 25, 2018, appellant filed a notice of appeal from the court’s April 3 orders. (Case No. A154696.)

DISCUSSION

I. Imputation of Income

“A trial court child support order is reviewed under the abuse of discretion standard of review, and the trial court’s findings of fact in connection with a child support order under the substantial evidence standard of review. [Citation.]” (*In re Marriage of Zimmerman* (2010) 183 Cal.App.4th 900, 906–907 (*Zimmerman*).)

“ ‘California has a strong public policy in favor of adequate child support. [Citations.] That policy is expressed in statutes embodying the statewide uniform child support guideline. (See [Fam. Code], §§ 4050–4076.)^[4] “The guideline seeks to place the interests of children as the state’s top priority.” (§ 4053, subd. (e).)’ ” (*In re Marriage of Sorge* (2012) 202 Cal.App.4th 626, 640.) Courts are therefore required to calculate child support under the statutory guidelines by applying a mathematical formula to the parents’ incomes. (*Ibid.*)

Section 4058 provides that a trial court must determine a parent’s annual gross income for purposes of determining the guideline child support amount by either using the parent’s actual income (§ 4058, subd. (a)) or by imputing income to a parent (§ 4058, subd. (b)). “Thus, a trial court may ultimately calculate the guideline child support amount by using, as the income factor in its support calculation, either (1) the parent’s actual income, as calculated under section 4058, subdivision (a) *or* (2) the parent’s imputed income, as authorized by section 4058, subdivision (b), if the court determines that imputing income to the parent would be more appropriate and would better serve the child’s best interests.” (*In re Marriage of Sorge, supra*, 202 Cal.App.4th at pp. 642–643.)

⁴ All further statutory references are to the Family Code unless otherwise indicated.

For purposes of imputing income, the court may consider earning capacity, which “ “is composed of (1) the ability to work, including such factors as age, occupation, skills, education, health, background, work experience and qualifications; (2) the willingness to work exemplified through good faith efforts, due diligence and meaningful attempts to secure employment; and (3) an opportunity to work which means an employer who is willing to hire.” ’ [Citation.] If a parent is unwilling to work despite the ability and the opportunity, earning capacity may be imputed. [Citation.] A parent’s motivation for not pursuing income opportunities is irrelevant” (*In re Marriage of LaBass & Munsee* (1997) 56 Cal.App.4th 1331, 1337–1338; see also *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 301 [“Where a factual basis exists for imputing income based on earning capacity . . . , there is legal authority to do so”].)

In this case, at the October 2017 hearing, the court imputed \$2,500 per month in income to appellant, based on a 2014 trial court income imputation, which in turn was based on a vocational report regarding appellant’s potential earnings in both real estate and retail sales, in which she had prior experience. This income amount was what the court described as “a San Francisco minimum wage imputation.” The court denied respondent’s request to increase the amount of imputed income to appellant, but did add the \$500 in monthly child support she received from respondent to the \$2,500 per month in imputed income.

Substantial evidence supports the court’s finding, based on the evidence from 2014 and the failure of appellant to present contrary evidence, that appellant had both the ability and opportunity to obtain fulltime work at this modest income level and that it would be in N.M.’s best interests for her to do so. (See *Zimmerman*, *supra*, 183 Cal.App.4th at pp. 906–907; *In re Marriage of LaBass & Munsee*, *supra*, 56 Cal.App.4th at pp. 1337–1338.) The court’s subsequent finding at the April 3, 2018 hearing that there had been no change of circumstances warranting a change in the amount of child support previously ordered was also supported by substantial evidence. (See *ibid.*) Accordingly, with respect to the amount of income imputed and the monthly amount owed, we

conclude appellant has not shown that the court's child support orders constituted an abuse of discretion. (See *Zimmerman*, at pp. 906–907.)

We do find, however, that the court's finding that appellant was not disabled in the period between the time respondent filed his request for modification on August 3, 2017 and the October 3 hearing is not supported by substantial evidence. Attached as an exhibit to appellant's declaration in support of her request for modification filed on September 14, 2017, she included a hospital document from August 14, 2017, indicating that she would be undergoing bone graft surgery on August 24 to repair her broken clavicle. At the October 3 hearing, the court stated it had read the medical records appellant had submitted and also stated that its "concern is that it looks like [appellant] was off work for a period of time due to the car accident and the injuries that she sustained, although I'm glad to see that you appear to be in one piece today." The court did not, however, refer to this evidence of temporary disability, including the surgery, when it ordered appellant to pay child support arrears for the two months between respondent's filing of his request for modification and the subsequent hearing.

In light of the evidence appellant presented regarding the planned surgery that was necessary to repair her broken clavicle, with no contrary evidence showing she was fit for work during the weeks before and after her surgery, we conclude the court's finding that appellant could work during the period of August 3 to October 3 is simply not supported by the evidence. Hence, the court's order requiring appellant to pay support arrears from the time respondent filed his request for modification, for a total of \$1,306, was an abuse of discretion and must be reversed. (See *In re Marriage of Zimmerman*, *supra*, 183 Cal.App.4th at pp. 906–907; *In re Marriage of LaBass & Munsee*, *supra*, 56 Cal.App.4th at pp. 1337–1338.)

II. Child Custody

Appellant contends the court erred in refusing to grant her joint legal and physical custody of N.M.

As previously noted, at the October 3, 2017 hearing, the court ordered appellant to, *inter alia*, participate in family therapy with N.M., "to address what happened last

year.” The court subsequently told appellant, at the April 3, 2018 hearing, that “[y]ou need to acknowledge and accept responsibility that the reason for the change of custody of your [child] to father’s custody was due to your own actions of child abuse that led to Child Protective Services removing the child from your [care]. And as we have talked about, there is certain aspects [*sic*] of your conduct and behavior and health that you need to address before the court will restore custody to you.” The court stated that it was glad that appellant had finally started family therapy with N.M., which it had ordered her to do several months earlier, and that she had completed a parenting class. The court continued, “And I am disappointed that to this day you continue to minimize your role in why [N.M.] is living with . . . father.” However, because it believed appellant was “on the right track,” the court granted her one four-hour unsupervised visit per week, in addition to the family therapy.

In its written order following the April 3, 2018 hearing, as noted, the court denied appellant’s request for joint legal and physical custody of N.M., explaining: “The court does not find that the presumption against custody pursuant to Family Code Section 3044 has been rebutted by a preponderance of the evidence at this time. This was a dependency case that required CPS intervention to remove the child from the mother. Modification of a dependency custody order requires a ‘substantial’ change of circumstances. [Citation.] After dependency was dismissed on 10/31/16 following a change of custody to the father, [appellant] has persistently requested a modification of custody and visitation since . . . 12/14/16, a mere two months later. Although [appellant] has since completed an anger management class and started family therapy with the child, she has not provided evidence regarding treatment for alcohol/substance abuse issues.”

“As trial courts have broad powers and have the widest discretion to fashion a custody and visitation plan that is in the child’s best interest, we employ the deferential abuse of discretion standard of review on a trial court’s ruling on custody and on visitation. . . . An abuse of discretion occurs when the trial court exceeds the bounds of reason” (*Heidi S. v. David H.* (2016) 1 Cal.App.5th 1150, 1162-1163 (*Heidi S.*))

In its order following the April 3, 2018 hearing, as noted, the court found that appellant had not rebutted the presumption discussed in section 3044, subdivision (a), which provides: “Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence within the previous five years against . . . the child . . . , there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interests of the child This presumption may only be rebutted by a preponderance of the evidence.” In addition, under Welfare and Institutions Code section 302, subdivision (d), after the juvenile court terminates its jurisdiction and issues an exit order, the family court may modify that order only if “the court finds there has been a significant change in circumstances since the juvenile court issued the order and modification of the order is in the best interests of the child.”

In the present case, child protective services removed N.M. from appellant’s custody in late 2016 and a dependency petition was filed that included allegations of physical abuse. The juvenile court sustained the allegations in the petition and awarded respondent sole legal and physical custody of N.M. By the time of the April 3, 2018 hearing, appellant had belatedly begun family therapy with N.M., had completed anger management and parenting classes, and had participated in positive supervised visitation. Based on these facts, the court reasonably found that appellant was “on the right track” and ordered weekly unsupervised visitation. (See *Heidi S.*, *supra*, 1 Cal.App.5th at p. 1167.) The court also reasonably found, however, that appellant still needed to address certain serious issues related to her abuse of N.M., based on its belief that appellant “continue[d] to minimize [her] role in why [N.M.] is living with . . . father.”

The court told appellant at the April 3, 2018 hearing that, in addition to continuing with family therapy, at some point she should provide the court “with some evidence related to your treatment or assessment for substance and alcohol abuse,” and in its order after hearing, the court stated that appellant had “not provided evidence regarding treatment for substance abuse issues.” Appellant points out that she had submitted a document to the court dated January 18, 2018, which stated that she had attended an

evaluation with Kaiser “due to possible concerns regarding alcohol use,” and that, according to the evaluator, she “does not meet criteria for Alcohol Dependency at this date.”

Although this document was properly filed by the time of the April 3, 2018 hearing, it does not appear that the court gave it any weight, whether because it was unaware it was in the record or for another reason. However, even taking this document into account, we conclude the court’s concerns about N.M.’s safety that were related to appellant’s limited progress in coming to terms with her physical abuse of N.M., which remained at the time of that hearing, were reasonable, as was its finding that appellant needed additional family therapy before she would be ready to have joint custody of N.M.

Hence, the evidence supports the court’s finding that appellant had not rebutted the presumption under section 3044 that joint custody would be detrimental to N.M. (§ 3044, subd. (a)), and that there had not “been a significant change in circumstances” since the juvenile court had issued its exit order such that “modification of the order [was] in the best interests of the child.” (Welf. & Inst. Code, § 302, subd. (d).) Although appellant clearly *had* made some progress toward a safe and positive relationship with N.M., the court acted well within its discretion in finding that the circumstances had not yet changed sufficiently for it to be in N.M.’s best interests to grant appellant joint legal and physical custody. (See *ibid.*; *Heidi S.*, *supra*, 1 Cal.App.5th at pp. 1162–1163.)⁵

The appellate court’s conclusion in *Heidi S.* is equally applicable to the court’s orders in this case: “Exercising reasonable judgment, the family court struck an appropriate balance in acknowledging that changed circumstances warranted modification of the visitation schedule but also determining that those changes did not justify the full remedy requested by mother, particularly her request for custody. That

⁵ We are confident that, if appellant’s progress continues, the trial court would reasonably find at that point that appellant has rebutted the presumption set forth in section 3044.

determination fell squarely within the broad discretion of the family court. [¶] We find nothing in the family court’s ruling to be arbitrary, capricious, or patently absurd.” (*Heidi S., supra*, 1 Cal.App.5th at p. 1167.)

III. Motion for Reconsideration

It is not clear from her opening brief whether appellant is challenging the court’s denial of her motion for reconsideration of the December 12, 2017 orders after hearing. Even if she is making such a challenge, however, as she acknowledges in her reply brief, the motion for reconsideration was filed more than 10 days after she was served with notice of entry of the challenged order, and so was untimely. (See Code Civ. Proc., § 1008, subd. (a) [when an order has been made by a court, a party “may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order”].) We are therefore without jurisdiction to address any issues raised in the motion for reconsideration or consider any documents filed with the motion. (See *In re Marriage of Furie* (2017) 16 Cal.App.5th 816, 831 [trial court would have been without jurisdiction to consider untimely motion for reconsideration].)⁶

DISPOSITION

The court’s order requiring appellant to pay \$1,036 in child support arrears to respondent is reversed. The orders appealed from are otherwise affirmed. The parties are to pay their own costs on appeal.

⁶ Finally, we find without merit appellant’s vague claim, without any supporting facts, that the trial court violated due process because its decision was not a reasoned one.

Kline, P.J.

We concur:

Stewart, J.

Miller, J.

Apostol v. Milyakov (A152915, A154696)